88-2018

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
THIRD DIVISION**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a police officer's good faith reliance on a third party's apparent authority to permit a consensual entry is a valid exception to the warrant requirement of the Fourth Amendment?

2. Whether the Illinois Appellate Court misinterpreted United States v. Matlock, in holding that there was no actual authority to permit a consensual entry?

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STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT THIRD DIVISION

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Appellate Court, of Illinois, First Judicial District, Third Division, which was entered on January 11, 1989.

OPINION BELOW

The order of the Appellate Court of Illinois, First Judicial District, Third Division, is reproduced in Appendix A to this Petition.

JURISDICTION

The order and judgment of the Appellate Court of Illinois, First Judicial District, Third Division, were entered on January 11, 1989. On April 5, 1989, the Illinois Supreme Court denied a Petition for Leave to Appeal. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The decision of the Appellate Court of Illinois, First Judicial District, Third Division was explicitly based on federal constitutional law, in particular on the Fourth and Fourteenth Amendments. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Fourteenth Amendment.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant Edward Rodriguez, was charged by information with possession of cannabis and possession of more than 30 grams of substance containing cocaine with intent to deliver. (R. 165) After a hearing on defendant's motion to quash arrest and suppress evidence before the Honorable James M. Schreier, the court granted defendant's motion. (R. 138-142)

On July 26, 1985, at approximately 2:30 p.m., Officers James Entress and Ricky Gutierrez of the Chicago Police Department, arrived at 3554 South Wolcott in response to a call from Officer Tenza. (R. 3-4) Officer Entress testified that when he arrived at 3554 South Wolcott, he and Gutierrez were met by Officer Tenza. (R. 5) They determined that a woman, Gale Fisher, had

been the victim of a battery, and that her mother, Dorothy Jackson was the owner of the house at 3554 South Wolcott. (R. 5-6) Officer Entress indicated that Gale Fisher had a swollen jaw, black eye and bruises on her neck. (R. 33) Officer Entress testified that while in the presence of the other officers and Dorothy Jackson, Gale Fisher stated that earlier that day, Edward Rodriguez had beaten her at their apartment at 3519 South California. (R. 5-6) Officer Entress further testified that Gale Fisher kept using the words "our" and "their" when referring to the apartment at 3519 South California. (R. 27-28) Gale Fisher stated that defendant was still at the apartment, that she had the key and would allow the officers entry to make the arrest. (R. 10, 27)

After this conversation, Gale Fisher, Dorothy Jackson and the officers proceeded to 3519 South California in order to effectuate defendant's arrest. (R. 28) When they arrived at 3519 South California, Gale Fisher took out the key, opened the front door and allowed the officers to enter. (R. 28-29) The officers placed defendant under arrest and seized tupperware containing a white powder substance which was later determined to be cocaine. (R. 29) The officers also seized pipes, scales and other drug paraphernalia which, like the cocaine, were all in plain view. (R. 29-31)

Dorothy Jackson, Gale Fisher's mother, testified to substantially the same facts as Officer Entress regarding the events of July 25, 1985. (R. 36-62) Dorothy Jackson further testified that the apartment at 3519 South California was Gale's home and

that Gale referred to it as "our apartment" when she spoke to the police on July 25th. In addition, Dorothy Jackson testified that on July 1, 1985, Gale and her two daughters began to stay with her on a temporary basis. (R. 39-43) Dorothy Jackson further testified that the reason her daughter had come to stay with her was because defendant wanted her away until their baby was bottle broken and potty trained. (R. 42) Dorothy Jackson also stated that on July 1, 1985, she drove Gale to 3519 South California to pick up some clothes. (R. 40-41) Although Gale took three bags of clothes, she left behind her furniture, stove refrigerator and personal items at 3519 South California. (R. 41)

Gale Fisher testified that she had known defendant for approximately two and a half years, and that she, along with her children, lived with him at 3519 South

California from December of 1984 through June of 1985. (R. 73-74) Gale Fisher further testified that although she moved into her mother's house on July 1, 1985, except for three bags of clothes, everything she owned remained at the 3519 South California apartment. (R. 73-79) In addition, Gale Fisher testified that between July 1, 1985 and July 26, 1985 she saw defendant at 3519 South California almost every day. (R. 79) Furthermore, she indicated that during that same period she probably slept the night there on occasion. (R. 74-80) As a result of the beating on July 26, 1985, Gale Fisher admitted that she had sustained a broken jaw. (R. 80) Finally, Gale Fisher testified that from July 1, through July 26, 1985, she did not have a key to the apartment at 3519 South California. (R. 86) She indicated that she had taken the key on July 26, 1985 without

defendant's knowledge. (R. 86) However, at the preliminary hearing which took place on September 11, 1985, Gale Fisher testified that defendant had given her the key to the apartment at 3519 South California. Furthermore, at trial, Gale Fisher admitted that she was afraid of defendant. (R. 92) Gale Fisher also admitted that she let the officers in using the key to the apartment at South California.

Based on the evidence which was adduced at the hearing on defendant's motion to suppress, the trial court found that Gale Fisher lacked actual authority to consent to the police entry. Furthermore, the court did not reach the issue of whether Gale Fisher had apparent authority to consent due to the fact that Illinois does not recognize this doctrine. Thus, the trial court granted defendant's motion to suppress.

On appeal by the State, the Appellate Court, First Judicial District, Third Division, affirmed the trial court's finding on both the issue of actual authority and apparent authority. The State then petitioned for leave to appeal to the Illinois Supreme Court. This petition was subsequently denied.

REASON FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I.

CONTRARY TO THE VAST MAJORITY OF JURISDICTIONS, THE ILLINOIS APPELLATE COURT HAS MISINTERPRETED THE FOURTH AMENDMENT BY REFUSING TO RECOGNIZE A VALID EXCEPTION TO THE WARRANT REQUIREMENT WHENEVER A POLICE OFFICER, IN GOOD FAITH, RELIES ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT ENTRY INTO THE HOME.

The Appellate Court of Illinois, First Judicial District, Third Division incorrectly interpreted the Fourth Amendment when it refused to recognize that a police officer's good faith reliance on a third party's apparent authority to give consent to enter can be a valid exception to the warrant requirement.

In reaching its decision in People v. Rodriquez, No. 86-2887, the Illinois Appellate Court, First Judicial District, Third Division has decided an important question of federal law, namely, whether the good faith reliance of the police on a third party's apparent authority to give consent to entry is a valid exception to the warrant requirement of the Fourth Amendment. In rejecting this doctrine, the Illinois Appellate Court chose to ignore the lead of some thirty other states and several federal circuit courts of appeal which have already embraced this doctrine. Undoubtedly, this issue is one of great magnitude, in that it is a situation frequently confronted by law enforcement officers at all levels throughout the country. Since this Court has never ruled on this issue, the People of the State of Illinois respectfully ask this Court to

give both the State and Federal Courts its guidance on this important issue.

The Appellate Court held that the trial court properly granted defendant's motion to quash arrest and suppress evidence. In reaching this conclusion, the Appellate Court recognized that the law in Illinois does not allow for an apparent authority to consent doctrine. In light of the growing trend which exists in various jurisdictions towards an acceptance of this doctrine, the People of the State of Illinois respectfully request this Honorable Court to embrace this doctrine. Indeed, it appears that the trial court itself was extremely reluctant to grant defendant's motion to suppress. The trial judge stated:

> "What the Illinois reviewing court would decide today based on the United

States Supreme Court cases cited by the State holds some doubt, leave the question perhaps somewhat open, a crack in the door. But I think I am obliged to follow the present situation in Illinois which would not allow for police to act on the apparent authority of the person allowing the search of an apartment, the person this case being Gale Fisher. Maybe that will change. It might change tomorrow ... I invite the State to make new law, which I think would be new in terms of the apparent authority. ...."

Besides Illinois, Oregon is the only State to continue to resist adoption of the apparent authority to consent doctrine. See: State v. Carsey, 295 Or. 32, 664 P.2d 1085 (1983). Indeed, a review of the law shows that every other State to decide this

issue has adopted this doctrine.[1]

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[1] Alaska (Nix v. State, 621 P.2d 1347 (Alaska, 1981)); Arizona (State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982)); Arkansas (Spears v. State, 270 Ark. 331, 605 S.W.2d 9 (1980)); California (People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955)); See: People v. Jacobs, 43 Cal. 3d 472, 729 P.2d 757 (1987) (en banc); Colorado (People v. Berow, 688 P.2d 1123 (1984)); District of Columbia (Jackson v. United States, 404 A.2d 911 (D.C. App. 1979)); Florida (Flanagan v. State, 440 So. 2d 13 (Fla. App. 1983)); Massachusetts (Commonwealth v. Wahlstrom, 375 Mass. 115, 375 N.E.2d 706 (1978)); Michigan (People v. Gary, 150 Mich. App. 446, 387 N.W.2d 877 (1986)); See: People v. Wagren, 114 Mich. App. 541, 320 N.W.2d 251 (1982)); Nevada (Snyder v. State, 103 Nev. Adv. Ops. No. 60, 738 P.2d 1303 (1987)); New Jersey (State v. Miller, 159 N.J. Super. 552, 388 A.2d 993 (1978)); South Dakota (State v. No Heart, 353 N.W.2d 43 (S.D. 1984)); Washington (State v. Christian, 26 Wash. App. 542, 613 P.2d 1199 (1980)), Affd., 95 Wash. 2d 655, 615 P.2d 806 (1981). In addition, several Federal Circuit Courts of Appeals have also adopted this doctrine. They include United States v. Peterson, 524 F.2d 167 (4th Cir. 1985); United States v. Sells, 496 F.2d 912 (7th Cir. 1975); See: United States v. Miller, 800 F.2d 129 (7th Cir. 1986); United States v. Hamilton, 792 F.2d 837 (9th Cir. 1986); See: United States v. Miles, 480 F.2d 1217 (9th Cir. 1973).

In People v. Adams, 53 N.Y.2d 1, 439 N.Y.S.2d 877, 422 N.E.2d 537 (1981), cert. denied, 454 U.S. 854, the New York Court of Appeals specifically adopted the apparent authority to consent doctrine. In Adams, defendant, although wounded in a gun-battle with the police, managed to flee the scene. At this point a woman, Arah Blue approached the police and identified herself as defendant's girlfriend. She gave the police defendant's name, told them defendant had threatened her, and escorted the police to defendant's apartment. Once at the apartment, Arah Blue opened the door with a key she was carrying. A search of the apartment revealed that defendant was in possession of a rifle and ammunition. The New York of Appeals upheld the denial of defendant's motion to suppress. The Court stated:

"We would agree that where the searching officers rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that the individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed. Application of the exclusionary rule in such instances of reasonable, good faith reliance by the police would do little in terms of deterring misconduct by the authorities in furtherance of the protections afforded by the Fourth Amendment. We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching

officers. Moreover, a warrantless search will not be justified merely upon a bald assertion by the consenting party that they possess the requisite authority. Nor may the police proceed without making some inquiry into the actual state of authority when they are faced with a situation which would cause a reasonable person to question the consenting party's power of control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule." Id. at 541.

While it is clear that adoption of the apparent authority to consent doctrine

represents the growing trend across the country, there are compelling reasons which would justify its adoption by this Court. First, the underlying basis of these decisions is fundamentally sound. In a situation such as the case at bar, where the police acted reasonably and in good faith, the purpose of the exclusionary rule is in no way served by excluding evidence. The purpose of the exclusionary rule is to deter police misconduct. Adopting the apparent authority to consent doctrine implicates none of the dangers which the exclusionary rule was designed to protect against. Indeed, in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), this Court implied its approval of the apparent authority to consent doctrine by allowing the "good faith" exception into Fourth Amendment jurisprudence. In light of this Court's

decision in Leon, the People of the State of Illinois maintain that the Illinois Appellate Court's ruling on this issue is in short, an incorrect interpretation of the Fourth Amendment. The Appellate Court was guided in its decision by People v. Vought, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (2nd Dist. 1988)[2] and People v. Bochniak, 93 Ill. App. 3d 575, 417 N.E.2d 722 (1st Dist. 1981), two cases which specifically rely on People v. Miller, 40 Ill. 2d 154, 238 N.E.2d 407 (1968), cert. denied 393 U.S. 961.

In Miller, the Illinois Supreme Court declined to adopt the apparent authority to consent doctrine. In that case,

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[2] People v. Vought, (88-1796) involves issues similar to those presented in the case at bar. A petition for a writ of certiorari was filed in that case on May 12, 1989.

the defendant was arrested at a private home where he was employed to care for a bed-ridden invalid. At the time of arrest, the police obtained the consent of the home owner to search defendant's automobile which was in the garage. The Illinois Supreme Court found the consent invalid and ordered that all evidence resulting from the search would be suppressed. The People submit that in Miller, the police officer's reliance on the home owner's consent would not have been reasonable under an apparent authority to consent doctrine. The police could have easily checked the license plate number to determine the automobile's true owner. In the case at bar, the police officers were faced with a much different situation. Here, the officers encountered a woman who had obviously just been brutally beaten. Her jaw was subsequently determined to be broken.

Gale Fisher told the police that defendant had beaten her, that defendant was at their apartment and that she had the key. Further, she stated that she would allow the police to enter in order to effectuate the arrest. Based on these factors, the police officers acted reasonably in relying on Gale Fisher's apparent authority to consent. While the police officers in Miller had the option to check the license plate number of defendant's automobile, the police in this case had no easy method to determine whether Gale Fisher truly had the necessary authority to consent. Should the police have required Gale Fisher to produce a copy of her lease at this point? Under Miller, the answer to this question is "yes." This result illustrates the fallacy of the underlying reasoning of Miller, and further shows the reason so many jurisdictions have adopted the apparent authority to consent doctrine.

Thus, in Miller, the Illinois Supreme Court expressed its disapproval of the propriety of recognizing the importance of a police officer's good faith reliance. Under current constitutional principles, the People maintain that the Appellate Court's interpretation of the Fourth Amendment in this area is an untenable position which is simply incorrect. The People also note that the Illinois Appellate Court's ruling leads to dissimilar results. Since the Seventh Circuit Court of Appeals has recognized this doctrine, See United States v. Miller, 800 F.2d 129 (7th Cir. 1986), if the charges in the case at bar had been brought by the United State's Attorney's Office for the Northern District of Illinois, an opposite result would have been reached. This illustrates both the magnitude of the Appellate Court's misinterpretation of the

Fourth Amendment and the urgency with which the People of the State of Illinois come before this Honorable Court.

II.

THE ILLINOIS APPELLATE COURT MISINTERPRETED THE FOURTH AMENDMENT AND UNITED STATES V. MATLOCK IN HOLDING THAT GALE FISHER LACKED ACTUAL AUTHORITY TO PERMIT A CONSENSUAL ENTRY.

The Appellate Court held that since Gale Fisher lacked the actual authority to consent to the entry by the police at the apartment at 3519 South California, defendant's motion to suppress was properly granted. The People maintain that the Appellate Court erred in affirming the trial court's grant of defendant's motion to suppress, where at the time Gale Fisher consented to allow the police to enter the apartment at 3519 South California, she possessed actual authority to grant that consent.

While the Appellate Court properly looked to the rule as set out by this Court in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the People of the State of Illinois maintain that the Appellate Court erred in its application of Matlock.

First, the trial court based its finding that Gale Fisher lacked actual authority to consent on the fact that 3519 South California was not her exclusive residence. While this is a factor to be considered, it is not controlling. In addition, the People maintain that the apartment at 3519 South California was Gale Fisher's exclusive permanent residence. Gale Fisher testified that she had lived there exclusively from December of 1984 until July 1, 1985. The People submit that when Gale Fisher moved temporarily into her mother's

house on July 1, 1985, 3519 South California remained both her exclusive and permanent residence. Indeed, her mother, Dorothy Jackson, testified that her daughter had taken only three bags of clothes with her, and that her daughter had moved in only on a temporary basis due to her husband's irritation with the baby. Furthermore, besides the three bags of clothes, evry other worldly possession that Gale Fisher owned remained at the apartment at 3519 South California. Also, Gale Fisher admitted this fact at the hearing on defendant's motion to suppress. The People note that this is a factor which the Appellate Court dismissed during its analysis. This fact clearly shows that the Appellate Court's conclusion that Gale Fisher was an infrequent visitor, guest, or invitee and thus lacked authority to consent was erroneous.

The Appellate Court further observed that Gale Fisher testified at the suppression hearing that she had stolen the key. While this testimony might or might not be relevant to determining actual authority (she also testified that she was afraid of defendant), this issue only illustrates the difficulty of using actual rather than apparent authority as a guide for police officers who must make on the street judgments. This testimony came only months after the arrest. How far must an officer question, when faced with an injured citizen the legitimacy of her possession of a key? In addition, nothing in the record establishes that defendant's claim to the apartment was superior to Gale Fisher's or to any other persons's. Especially in a day of fluid living arrangements, actual authority may be a very elusive concept and one quite

unsuited to the exigencies of the situation. Apparent authority, on the other hand, can be assessed and reviewed on the basis of information known to the officer at the time of entry.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should issue to review the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

EDWARD RODRIGUEZ,

Defendant-Appellee.

ORDER

The defendant, Edward Rodriguez, was arrested on July 26, 1985, and charged with possession of a controlled substance with the intent to deliver. He was charged on the basis of certain items of physical evidence seized during a warrantless search of his apartment that was conducted pursuant to the consent of a third-party. The trial

court granted defendant's motion to quash his arrest and suppress evidence, holding that the party who consented to the entry into defendant's apartment was without authority to do so. The State appeals from this order questioning whether consent to enter was properly given.

The trial court heard defendant's motion to suppress evidence on the grounds that the party who consented did not have the authority to consent because she was not living at defendant's apartment at the time that she consented to the entry. At the hearing, Officer James Entress testified that on July 26, 1985, at about 2:30 p.m. he and his partner, Officer Ricky Gutierrez, received a call from Officer Tenza asking for assistance at a residence located at 3554 South Wolcott. Upon arriving, Officer Entress had a conversation with Gale Fisher.

Also present during this conversation were Officer Tenza, Officer Gutierrez, and Dorothy Jackson (Fisher's mother). Fisher told Officer Entress that earlier in the day defendant had beaten her at their apartment at 3519 South California and that she wanted to make a complaint. She also indicated that she had been living at that apartment, that her clothes and furniture were in that apartment, that defendant was presently asleep there, and that she had a key to the apartment and would let the officers enter to arrest defendant. During direct examination, Officer Entress acknowledged that he had testified at a preliminary hearing that Fisher had told him that she used to live at the apartment on South California. However, he went on to say that it was his impression that she was still living there at the time she agreed to let them into the apartment.

Officer Entress testified that during his conversation with Fisher he told her that they would only arrest defendant if Fisher was certain that she wanted to press charges against him, and that she seemed hesitant about signing a complaint. Having recalled a conversation with someone a year earlier concerning the involvement of an individual named Edward Rodriguez with narcotics, Officer Entress asked Fisher if defendant was involved with narcotics and Fisher would not respond to that question. Officer Entress testified that he, Officer Gutierrez, Fisher and her mother proceeded to the apartment on South California. Fisher opened the door with her key and allowed the officers to enter. Officer Entress first entered the living room where he observed containers of a substance he believed to be cocaine and drug paraphernalia including pipes and scales. He

then proceeded to the bedroom where he observed defendant sleeping on a bed. In the course of waking defendant, Officer Entress saw two open briefcases at the side of the bed that contained a white substance that he believed to be cocaine. Defendant was subsequently arrested. On cross-examination, Officer Entress testified that Fisher used the term "our" and "their" when referring to the apartment on South California.

Dorothy Jackson testified that on July 1, 1985, she drove her daughter to the apartment on South California at the latter's request so that she could remove her clothes from the apartment. She removed several bags of clothing and left behind her stove, refrigerator and some furniture. Ms. Jackson testified that her daughter told her that she was staying with her because defendant wanted one of their two children toilet trained.

She stated that since there was no agreement that Fisher and the children would stay with the witness, Fisher would have to return to her apartment on South California after the child was trained. According to Ms. Jackson, her daughter and her children stayed with Jackson from July 1 through July 26, 1985. During that time Fisher visited defendant and, on approximately two or three occasions, spent the night at his apartment. She also stated that the apartment on South California was Ms. Fisher's home. In the afternoon of July 26, Fisher went to Ms. Jackson's house and told her that defendant had beaten her, whereupon Ms. Jackson telephoned the police and Officer Tenza arrived a few minutes later.

Fisher testified that she lived with defendant at the apartment on South California from December 1984 through June

1985, and that she moved in with her mother on July 1, 1985. When she moved in with her mother, she left the key at defendant's apartment. She stated that she did not have a key to defendant's apartment from July 1 to July 26 and that defendant would let her into the apartment when she went to visit him during that time. She did take a key from defendant's dresser on July 26, after she and defendant had argued. During July 1985 she never had any friends at the apartment on South California, she only went there to visit defendant, and she never went there when defendant was not in the apartment. According to Fisher, she did not remove her stove, refrigerator and furniture that her name was not on the lease and that defendant always paid the rent on the apartment. Fisher stated that although she did tell Officer Entress that she had a key to the

apartment and agreed to let him inside, she also indicated that she did so because the police told her that that is what she had to do if she wanted to press charges. She denied telling Officer Entress on July 26 that she was living in the apartment on South California.

Our review of the trial court's decision to grant defendant's motion to suppress, recognizes that its ruling will not be set aside unless clearly erroneous. (People v. White (1987), 117 Ill. 2d 194, 512 N.E.2d 677.) We note at the outset that this case involves a consent to enter and not a consent to search, and that case law regarding third party consent commonly involves consent to search. However, the concept of consent to search is fundamentally intertwined with the concept of consent to enter since the validity of a warrantless

seizure of evidence in plain view depends on the validity of the entry by the officers seizing the evidence. Therefore, the application of that case law to the instant case is both proper and relevant. In determining whether Fisher had the authority to consent to the warrantless search of defendant's apartment, we are guided by the rule set forth in United States v. Matlock, (1974), 415 U.S. 164, 171, 39 L.Ed.2d 242, 94 S.Ct. 988, which involved a consent to search. In that case, the United States Supreme Court ruled that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other significant relationship to the

premises or effect sought to be inspected." The Supreme Court explained the term "common authority" as follows:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed that risk that one of their number might permit the common area to be searched." United States v. Matlock, (1974), 415 U.S. 164, 171, n.7.

The Illinois Supreme Court adopted this common authority doctrine for cases involving third-party consent in People v. Stacey (1974), 58 Ill. 2d 83, 317 N.E.2d 24. In that case the defendant's wife who was jointly occupying a house with the defendant, allowed police to remove a shirt from defendant's dresser drawer that was located in their bedroom. The court concluded that the mere fact that the defendant alone may have used a dresser drawer while his wife may have used another did not indicate that the wife was denied the mutual use, access to or control of the drawer.

The application of this doctrine requires a determination as to whether the consenting party had sufficient common authority to consent to the entry of the premises where the evidence was found in

plain view. (People v. Callaway, (1988), 167 Ill. App. 3d 872, 522 N.E.2d 337); People v. Posey (1981), 99 Ill. App. 3d 943, 426 N.E.2d 209.) The third-party consent to enter must be made from a person who has control over the premises. (People v. Daugherty (1987), 161 Ill. App. 3d 394, 514 N.E.2d 228.) In reviewing the record in the instant case, we note that the trial court properly rejected the State's contention that Fisher had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority. (People v. Vought (1988), 174 Ill. App. 3d 563, 528 N.E.2d 1095); People v. Bochniak (1981), 93 Ill. App. 3d 575, 417 N.E.2d 722. We also agreed with the trial

court's finding that Fisher lacked sufficient authority to justify the police action because under the common authority doctrine set out in Matlock her consent was not valid. In reaching its determination the trial court mentioned the following factors established by the evidence as controlling: (1) Ms. Fisher's name was not on the lease and she did not contribute to the. rent; (2) defendant's apartment was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee; (3) she did not have access to the apartment when defendant was not there and, like a guest, she only had access when defendant was present; (4) she never brought people over to the apartment; and (5) she moved her clothes, and more importantly, her children to her mother's residence. All of these factors indicate that Fisher did not

have the common authority over the defendant's apartment that was necessary to make her consent to enter valid. The fact that the evidence seized was in plain view does not change the outcome of this case because the plain view doctrine is dependent upon an original lawful entry (People v. Patrick (1981), 93 Ill. App. 3d 830, 417 N.E.2d 1056), and we have held the evidence does not contravene the conclusion that the original entry was unlawful. Therefore, the trial court's decision to grant defendant's motion to suppress was proper.

For the reasons set forth above, the judgment of the circuit court is affirmed.

Judgement affirmed.

FREEMAN, P.J., with Mcnamara and WHITE, JJ., concurring.